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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HECTOR GUZMAN-GUTIERREZ,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-71657

Agency No. A79-167-205

MEMORANDUM*

HECTOR GUZMAN-GUTIERREZ,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-75325

Agency No. A79-167-205

On Petition for Review of an Order of the
Board of Immigration Appeals

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted December 5, 2005
Portland, Oregon

Before: BROWNING, D.W. NELSON, and O'SCANNLAIN, Circuit Judges.

Hector Guzman-Gutierrez is a Mexican national who has accrued more than a year of unlawful presence in the United States. Although inadmissible under § 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1182(a)(9)(C)(i)(I), Guzman-Gutierrez argued that he was eligible for penalty-fee adjustment of status under INA § 245(i). An Immigration Judge found him to be ineligible and granted him voluntary departure with an alternate order of removal. The Board of Immigration Appeals (“BIA”) dismissed his appeal.

Although Guzman-Gutierrez filed a timely petition for review of the BIA’s decision, he also filed a motion to reopen in which he contended that he was eligible for the extreme hardship waiver of INA § 212(a)(9)(B)(v). The BIA treated this motion as a motion for reconsideration and denied it as untimely.

For the reasons set forth in *Acosta v. Gonzales*, No. 04-72682 (February __, 2006), we reverse the BIA decision on the merits and conclude that Guzman-Gutierrez is eligible for penalty-fee adjustment of status under INA § 245(i).

Since we reverse on the merits, we ordinarily need not reach the issue of denial of his motion for reconsideration. However, to the extent that he raises the

extreme hardship waiver issue, it is foreclosed; it was first raised in such motion which was untimely because it was filed more than thirty days after the BIA's decision. We therefore affirm the BIA's dismissal of the motion for reconsideration.

REVERSED and REMANDED in part, AFFIRMED in part.